IN THE SUPREME COURT OF THE UNITED STATES

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ALBERTO R. GONZALES, :

ATTORNEY GENERAL, :

Petitioner :

v. : No. 05-380

LEROY CARHART, ET AL. :

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Washington, D.C.

Wednesday, November 8, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

GEN. PAUL D. CLEMENT, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

PRISCILLA SMITH, ESQ., New York, N.Y.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in case 05-380, Gonzales vs. Carhart. General Clement.

ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

ON BEHALF OF PETITIONER

GENERAL CLEMENT: Mr. Chief Justice, and may it please the Court:

Congress held six hearings over four different Congresses and heard from dozens of witnesses in determining that partial-birth abortions are never medically necessary, pose health risks, and should be banned. Under familiar principles of deference to congressional fact-finding, those determinations should be upheld as long as they represent reasonable inferences based on substantial evidence in the congressional record.

That standard is amply satisfied here. The evidence before Congress was clear that partial-birth abortions were never medically necessary, and that safe alternatives were always available such that no woman would be prevented from terminating her pregnancy. As a result, Congress was entitled to make a judgment in furthering its legitimate interests that they were going

to ban a particularly gruesome procedure that blurred the line between abortion and infanticide.

JUSTICE GINSBURG: General Clement, couldn't a similar record be made with respect to what is the more common procedure, the D&E, that involves dismemberment of a fetus inside the womb. So assuming you're right that it is constitutional for Congress to ban the D&X proceeding, wouldn't the same reasoning apply, couldn't Congress make similar findings with respect to what is the most common method for second trimester abortions?

GENERAL CLEMENT: I don't think so, Justice Ginsburg, and I think that this Court's precedence, in particular the Danforth case, would stand as an obstacle to that piece of legislation, because in Danforth, this Court struck down an effort to ban what was then the majority method of inducing a second term abortion.

And I think in the same way, there is quite a different situation when Congress comes in and tries to deal with the primary abortion method in the second trimester. Here, though, Congress didn't go after the dog, so to speak, it went after the tail. This very aberrant procedure, atypical procedure. And the numbers are hard to come by, but I don't think anybody suggests that the D&X procedure is anything more than a very

small minority of second trimester abortions. And so I do think --

JUSTICE GINSBURG: Even though we are told by some of the medical briefs that the procedure is basically the same, they start out in the same way and that the difference -- the differences are not large in particular cases.

GENERAL CLEMENT: Well, Justice Ginsburg, let me make a couple of points in response to that. I think -- taken at the broader level first, I think there is one very important difference between these two procedures that led Congress to ban one and allow the other to stand. And that is whether fetal demise takes place in utero, which is, of course, the hallmark of all abortions, or whether fetal demise takes place when the fetus is more than halfway out of the mother.

Now, as to their suggestion, I think most particularly by Respondents in the second case, that there really is no meaningful difference between those two procedures. And with respect, I just don't think the record supports that. If you look at the record in this case, it's very clear in the district court opinion that you have some doctors, and examples would be Plaintiff's expert, Dr. Creinin, or one of the Nebraska Plaintiffs, Dr. Vibhakar. They go in, in each and every

case, and try to perform a dismemberment, or D&E, procedure.

And because they're trying to perform the D&E procedure, they need to dilate the cervix only modestly. And so Dr. Creinin, for example, his testimony is he only dilates the cervix two centimeters or two and a half centimeters.

Now, in contrast, you have other doctors, and here the examples I would point to are two of the Plaintiff's experts, Dr. Chasen and Dr. Frederickson, they, in every single case, set out to perform the D&X procedure. And that has material differences. For example, the dilation regimen that they use. And so Dr. Frederickson, for example, uses multiple sets of laminaria to dilate the cervix, and she gets a much greater degree of dilation, 5 to 6 centimeters of dilation.

And of course, not only do they set out to perform different procedures, but they, in fact, perform different procedures. So the evidence here again reflects that Dr. Vibhakar, for example, in 100 percent of the cases, ends up performing a dismemberment procedure, or a D&E procedure. For Dr. Creinin, it's 99 percent.

Now, by contrast, Dr. Chasen and

Dr. Frederickson, when they set out to perform a D&X procedure, they are successful in their objective less often. There are different numbers for different doctors, but it seems that, at most, they can achieve their objective about a third of the time.

JUSTICE KENNEDY: Well, didn't those doctors testified in the congressional hearings or in the Eighth Circuit or Ninth Circuit or the Second Circuit? There are so many doctors here. Which are the two that you're referring to that do not dilate the cervix fully? Did they testify in any of the district court cases?

GENERAL CLEMENT: They did, Justice Kennedy, and in particular, Dr. Creinin is an expert. I think his deposition was taken, or his testimony was taken principally in the California case, but it was introduced in all three cases as part of the evidentiary record. Dr. Vibhakar is one of the Plaintiffs in this particular case. And Dr. Chasen and Dr. Frederickson would also -- their testimony was in the record, I think, in all three cases.

JUSTICE BREYER: Just from my going through this record, I compare it to Stenberg, with what's in Congress. We have two cases here. And it's a fair conclusion that there are, in each case, before Congress and in here, there are some doctors who think this is

safe and some doctors who think it isn't safe.

And if you look at the -- sort of by counting, by numbers, I guess if you look by lines of testimony or by different doctors, interestingly enough, it seems to me there are more doctors in these two cases and in front of Congress who said it is not safe than there were when we considered the other case. And there are fewer doctors who say it is safe even with the other case. So I don't know if you're supposed to count doctors or what.

My question would be, if this -- do we owe more deference to a congressional finding or to Congress than we owe to a state legislature? What is -- I mean, I take it a state legislature is democratically elected, and don't we owe similar deference to both?

GENERAL CLEMENT: Well, Justice Breyer, I think you certainly owe deference to both. I think --

JUSTICE BREYER: Well, if we owe deference to both, and I would have thought that we did, then I think in the Nebraska case, despite the deference that was owed, the Court came to the conclusion that the statute of Nebraska was unconstitutional because it lacked an exception for the health of the mother, something that came from preceding cases. So if giving deference to Nebraska, we reach that conclusion there,

and if the deference that is owed is the same, and if the evidence is about the same on both sides, how can we reach a different conclusion here?

GENERAL CLEMENT: Well, Justice Breyer, I mean, obviously I'm at a certain deficit to you in discussing what this Court held in the Stenberg opinion, which you wrote. But my reading of that opinion is that this Court did not focus on what was before the Nebraska legislature. But this Court focused on what the district court found. And in particular, in the critical part of the opinion, which would be Section 2(A) of the opinion, as I read the opinion, what this Court did is it confronted Nebraska's argument that the D&X procedure was not, in fact, safer.

And the first thing this Court did is said, well, that argument faces quite a burden, because the district court made a contrary finding. And then this Court in 2(A)(1) of the opinion referenced that finding, and four different times cited the district court record, and then so on and so forth. It then noted the various eight arguments were made by the state in its amici to the contrary. And as I read the opinion, it basically says the latter of the objections don't outweigh the former findings.

Now, I think if you compare the record

before the courts and before Congress, compare that to what was before the district court in Stenberg, I think there is a much more robust factual record here. If you look at the Stenberg case --

JUSTICE STEVENS: General Clement, are not some of the findings by Congress clearly erroneous? For example, there is a statement that no current medical schools provide instruction in the procedure. Now that's clearly wrong, isn't it?

GENERAL CLEMENT: Well, I mean, specifically what Congress found in that finding was that none of them provided it as part of a curriculum. And I think what the record here clearly reflects -- you know, I don't know that the idea of a curriculum -- I don't know exactly what Congress had in mind. But clearly, it's a matter of teaching residents --

JUSTICE STEVENS: Do you think that finding is correct?

GENERAL CLEMENT: I don't know if it's correct, based on the curriculum.

JUSTICE STEVENS: Supposing there was a lot of evidence introduced in the district court that there were schools like Yale and New York University that did include this as part of a curriculum, could the district court disregard that finding and make a contrary

finding?

GENERAL CLEMENT: I think if the evidence in the district court were overwhelmingly to the contrary, I think that the district court could effectively undermine that one finding. I don't think in this case anything turned --

JUSTICE STEVENS: Well, on other findings, is there a different standard of review of what the district court found as opposed to what Congress found?

GENERAL CLEMENT: Well, Justice Stevens, I may answer you this way. You might first want to isolate those situations where, if the district court was addressing something, an issue that just wasn't before Congress at all, but it's somehow relevant, and makes factual findings, I suppose the district court is entitled to the normal kind of deference on review.

But I think if you have situations, which you have in this case, where the district court heard some of the same witnesses who testified before Congress and before the district court, and the district court makes a different credibility finding than the Congress made, I don't think that's a basis for the district court to be able to overcome the contrary findings of Congress.

JUSTICE STEVENS: Well, I don't understand

Congress to have made credibility findings. As I read the -- I read the whole finding. There were six or seven pages of findings, and I don't find a single reference in those findings to the performance of an abortion on a nonviable fetus. All of the language in the findings seem to be referring to viable fetuses just inches away from becoming a person. And I don't think you can even find the word fetus in those findings. The findings as opposed to the text of the statute.

GENERAL CLEMENT: Sure, Justice Stevens, I think I need to clarify an important point there, which is to say, the statute didn't focus on viable versus nonviable, because it applies to both sides of the viability line.

JUSTICE STEVENS: I'm talking about the findings. Is there a single word in the findings that refers to a viable fetus? It maybe refers to a nonviable fetus.

GENERAL CLEMENT: I don't think there is, Justice Stevens, but I wouldn't find that at all remarkable in a statute that applies and bans certain procedures without regard to whether the procedure is applied to a viable or non-viable fetus and when Congress does make specific findings that the procedure it's banning would have the effect of preventing a

lethal act on a fetus just inches from being born. It's not --

JUSTICE STEVENS: May I interrupt?

GENERAL CLEMENT: Sure.

JUSTICE STEVENS: It's requiring that the lethal act be performed prior to any part of the delivery, because there is no doubt there will be a lethal act. The only issue is when it may be performed.

GENERAL CLEMENT: The issue is whether --

JUSTICE STEVENS: Yes.

GENERAL CLEMENT: Yes. Because the issue is whether it's going to be performed in Ute row --

JUSTICE STEVENS: Whether the feet are more than halfway out, and some of these fetuses I understand in the procedure, are only four or five inches long. They are very different from fully formed babies.

GENERAL CLEMENT: Justice Stevens, again, you're right.

JUSTICE SCALIA: When it's halfway out, I guess you can call it either a child or a fetus.

GENERAL CLEMENT: I think you could use either terminology, Justice Scalia. My point is, nothing turns on the terminology. I mean, the terminology that Congress chose to use is a living fetus. I think the point, though, is that when fetal

demise is induced in utero, whatever else you think about that procedure that is classically an abortion, as it has been always understood. But when fetal demise is induced when the, when the living fetus is over halfway outside of the womb, then I think Congress --

JUSTICE STEVENS: Wouldn't the fetus be -- I think it suffer a demise in seconds anyway.

GENERAL CLEMENT: Well it may be seconds, it may be hours; it depends on -- because even a pre --

JUSTICE STEVENS: Do you not agree that it has no chance of surviving, in most cases?

GENERAL CLEMENT: If we are talking about previability then by definition chances are it won't survive.

JUSTICE STEVENS: Yes, that's right.

GENERAL CLEMENT: But again, I don't think that, you know, that anything in this act --

JUSTICE STEVENS: Congress has made the judgment that it is far preferable to ensure that fetal demise takes place before any delivery begins. That's the big issue.

GENERAL CLEMENT: Well, I'm not sure if it's whether, that's a fair, that's a fair summary. I mean, you know, the line isn't that fetal demise has to be done before any delivery begins, but the basic point of

this statute is to draw a bright line between a procedure that induces fetal demise in utero and one where the lethal act occurs when the child or the fetus, whichever you want to call it, is more than halfway outside of the mother's womb.

JUSTICE SCALIA: Would it, would it be lawful or would it be infanticide to deliver the fetus entirely and just let it expire without any attempt to keep it alive?

GENERAL CLEMENT: Well, in the post-viability context it would clearly be, it would clearly be infanticide. I think in the pre-viability context, if you have a complete delivery but the child isn't going to survive, I don't think it would be infanticide to necessarily let the child expire --

JUSTICE GINSBURG: Mr. --

GENERAL CLEMENT: But I do think by contrast if somebody tried to, with the fetus, you know, perfectly alive and in the hours that it might have to live, if somebody came in and ripped its head open, I think we'd call that murder, and in fact Congress passed another statute --

JUSTICE GINSBURG: General Clement, that's not what this case is about, because I think you have recognized, quite appropriately, that we're not talking

about whether any fetus will be preserved by this legislation. The only question that you are raising is whether Congress can ban a certain method of performing an abortion. So anything about infanticide, babies, all that, is just beside the point because what this bans is a method of abortion. It doesn't preserve any fetus because you just do it inside the womb instead of outside.

GENERAL CLEMENT: Justice Ginsberg, that's right, but I don't think that's to trivialize Congress's interest in maintaining a bright line between abortion and infanticide. And the way I would illustrate it is that line, even if you might think it has a temporal line, in the sense that viability versus previability is relevant, it clearly has a spatial dimension as well and the best illustration of that I think is think about a lawful post-viability abortion. There is a problem with the mother's health, there is a problem with her life so it's a lawful post-viability abortion. I don't think that anybody thinks that the law is or should be indifferent to whether in that case fetal demise takes place in utero or outside the mother's womb. The one is abortion, the other is murder.

And I think that just recognizes that even in the post-viability context you have a very important

line which is a spatial line, and that line is basically in womb, outside of womb, and what Congress tried to do in this statute is to draw that line and differentiate between one procedure where fetal demise takes place in utero --

JUSTICE GINSBURG: But if this case were limited to post-viability abortions it would be a different matter. But isn't it so that the vast majority of these abortions are going to be performed pre-viability?

GENERAL CLEMENT: I think that's probably right, Justice Ginsburg, but I think the point I would make is that Congress has an interest in maintaining the spatial line between infanticide and abortion, even with respect to pre-viability fetuses and that's true for at least two reasons.

JUSTICE BREYER: If -- I see what you're driving at in terms of the procedure. We are focusing on a universe where the fetus is not going to survive no matter what, right?

GENERAL CLEMENT: Right.

JUSTICE BREYER: Okay. So we are not talking about anyone being born and living. They are not going to.

GENERAL CLEMENT: Well, with the caveat gnat

statute does apply both --

JUSTICE BREYER: And that's the area of focus.

GENERAL CLEMENT: Right.

JUSTICE BREYER: Now, Congress has said the doctor, you can achieve that result through method A, but not through method B, and you're saying Congress had good reason for doing that. I take it Congress also agrees that if method B, which they don't want, were to be necessary for the safety or health of the mother, the Constitution would require it being done. I didn't see anything here about Congress disagreeing with that.

GENERAL CLEMENT: Oh, I think that's right, Justice Breyer. I think this, Congress --

JUSTICE BREYER: All right. If that's right --

GENERAL CLEMENT: -- took this Court's Stenberg's decision as a given --

JUSTICE BREYER: Right. Fine. Okay. They make a finding that although we don't disagree with that, we don't think it's ever necessary for the health or safety of the mother. That's where we are. Now as I look at the record, I see many, many, many doctors telling Congress and everybody else that it is necessary, and safe. And I see other doctors telling

Congress primarily, but in court, too, that it isn't necessary, ever for safety.

And so if medical opinion is divided, and I'm not advocating what I'm about to say, I just want to know your reaction. If medical opinion is divided, why wouldn't it be up to this Court or could this Court say this use of this procedure, we enjoin the statute to permit its use but only where appropriate medical opinion finds it necessary for the safety or health of the mother?

Now, if Congress is right, there will be no such case so it's no problem. But if Congress is wrong, then the doctor will be able to perform the procedure and Congress couldn't object to that because the Congress isn't worried about, I mean Congress, then Congress was wrong. They agreed that we had a health or safety exception.

GENERAL CLEMENT: With respect, Justice Breyer, here is the problem with that way of approaching the statute. That might be a permissible way of approaching it if what the evidence on the other side was, that well you know there are cause-specific reasons why you need this procedure. There are particular conditions where you need this procedure. But that's not the evidence on the other side. What their doctors

say, the doctors who perform this D&X procedure, the Dr. Chasens, the Dr. Fredericksons, what they will tell you is that every single case the D&X procedure is better and safer and they want to do it. And so it doesn't make, I mean Congress can't pass a statute that bans procedure A, and that ban doesn't apply any time a doctor prefers procedure A.

JUSTICE BREYER: No. It just wouldn't be a question of the doctor's preference. You would have to refer back to prior cases, and what the prior cases talk about including Stenberg is not that that the doctor simply has a preference, but rather that there has to be a significant body of medical opinion that says that this a safer procedure and necessary for the safety of the mother.

Now, where that's true, the Court has previously said that the Constitution protects the right. And I don't see anything in what Congress says that wants to change that law. They simply have a different view of the facts.

GENERAL CLEMENT: Well, they do have a different view of the facts. And I guess the question --

JUSTICE BREYER: So if they have a different view of the facts, why can't we leave it up to whatever

facts develop? If there is an appropriate body of medical opinion that does in fact believe this is necessary for the health of the mother, so be it, and the abortion could be performed and the injunction would say that.

GENERAL CLEMENT: Well, I think --

JUSTICE BREYER: And otherwise not.

GENERAL CLEMENT: If this Court rejects the facial challenge to this statute it is still going to be open for litigants in the future to try to identify certain conditions where this procedure is the safer alternative.

JUSTICE KENNEDY: Can you tell me a hypothetical instance in which where an as applied challenge could be brought if we sustain the procedure on its face? The procedure has to take place within 24, 48, 72 hours. How would as applied challenge take case? And I have read all the doctors' testimony in this case in this case, hundreds of pages, and I'm familiar with the area generally. But it takes a while to get up to speed. I don't know if you could just go to a district judge and say I need an order, the judge would take -- would have to take many hours to understand that.

GENERAL CLEMENT: Justice Kennedy, what I think I have in mind principally would be a

pre-enforcement challenge that was an as applied challenge. And what I have in mind, you know that's something that there is in other areas of the law, Steffl against Thompson is an example. But what you would have in mind is a doctor who had standing under this Court's abortion jurisprudence would come in and say, look, in my practice I've seen that this procedure would be particularly useful in dealing with preeclampsia or placental previa or some condition.

JUSTICE KENNEDY: Why isn't that already in the, then, in the Ninth Circuit, in the Second Circuit and in the Eighth Circuit, in the district courts, proceedings in those circuits?

GENERAL CLEMENT: Well, there is an effort to make that showing. I don't think that it's been a successful effort to make that showing. In fact I think if you look at the findings of the district courts in these cases, two of the three district courts found that there was no particular condition where the D&X abortion was medically necessary or had marginal safe benefits -- safety benefits. In this case, the Nebraska case, the district court identified only two conditions, preeclampsia combined with maternal cancer, and placenta previa. And as to those particular findings as we point out in our reply brief, there are problems with each of

these findings.

JUSTICE KENNEDY: General Clement, I'm just thinking, trying to imagine how an as applied challenge would be really much different from what we have seen already.

GENERAL CLEMENT: Well, I don't think, I mean, they've challenge everything including every application of the statute and they've tried to pick off some particular conditions. What I'm imagining is in the future you might have, you might have additional evidence, you might have additional experience with doctors, and they might come in and target their challenge to particular conditions and try to say --

JUSTICE GINSBURG: But General -- General Clement, conditions don't show up in the abstract. Wouldn't it often be the case that it depends on the vulnerability of the particular patient and you couldn't bring a pre-enforcement challenge as to that. Maybe it's a question of hemorrhaging, that -- it's a combination of what the condition is and the vulnerability of the particular patient and I don't see how that could be tested in advance.

GENERAL CLEMENT: Well, Justice Ginsburg my understanding is even when you talk about an idiosyncratic condition, I mean, the doctors who perform

these abortions perform, you know, hundreds of them a year and they can identify those conditions and they have names for those conditions and I think it would be amenable to bringing a more as applied challenge.

CHIEF JUSTICE ROBERTS: General, do you understand the scope of this statute to be different than the scope of the statute at issue in Stenberg, focusing in particular on the deliberate and intentional language?

GENERAL CLEMENT: I certainly do, Mr. Chief Justice, and I think that this statute, unlike the Nebraska statute, clearly uses an anatomical landmark approach that is based in the text of the statute and clearly distinguishes between the D&E procedure on one hand and the D&X on the other hand.

JUSTICE SOUTER: But isn't it quite independent of the anatomical approach that the health exception is denied? I mean that's an -- that does not depend on the anatomical approach. The anatomical approach may be well be an answer at the facial challenge stage, to problems of vagueness, for example. But the health problem is not affected by that. And the difficulty that I have with your argument that somehow the health exception issue should be left to an as applied challenge is the statement in Stenberg, and it's

on 938.

I'm quoting: "But where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, Casey requires the statute to include a health exception where the procedure is necessary in appropriate medical judgment for the preservation --" -- excuse me -- "of the life or health of the mother."

Now, your position, it seems to me, requires us to do one of three things. Either we, we overrule Stenberg in that respect, or we, we find -- I don't know how but we might find, well, in this case, there is no substantial medical authority, and therefore on the face of the statute there seems to be no impediment in the Stenberg statement. Or three, we say well, there seems to be a tension between the showing of substantial medical authority which occurred in the litigation in these cases and the findings made by Congress, and under those circumstances in effect we are required to ignore the record in the cases and go with Congress's apparently contrary judgment.

Which of the three do we take?

GENERAL CLEMENT: Well, we would urge you to take any one of them.

JUSTICE SOUTER: Take all three.

(Laughter.)

JUDGE SOUTER: No, but seriously --

GENERAL CLEMENT: But in fairness, I mean, you know, we have an obligation to defend the statute. So our first, you know, our first effort would be to say we distinguish the --

JUSTICE SOUTER: Okay, but the problem, I guess -- focus the problem this way. The, the Stenberg opinion talks about substantial medical authority as triggering this requirement for a statutory element. That problem is not focused simply by saying Congress made some findings and the district court made other findings and Congress should prevail.

The fact is the substantial medical judgment finding I would suppose is satisfied by the, by the record in the district courts in these cases. This is not one doctor's idiosyncratic judgment and a court can reasonably find, it seems to me, that there is substantial medical judgment. If we are going to defer, as you say we should defer to Congress, haven't we got to overrule that statement?

GENERAL CLEMENT: I don't think so, Justice Souter. Let me just -- I'd like to save some time for rebuttal, but let me try to answer it this way, which is our way of looking at Stenberg is Stenberg really

doesn't address what you do when there are congressional findings. And there is some tension between Stenberg and Turner on this, because Stenberg seems to suggest, well, when there is a doubt, the kind of doubt that would normally get you past a summary judgment, you defer to the doctors, and Turner seems to suggest when you have a doubt, conflicting evidence, the kind of doubt that might get you past summary judgment normally, you defer to Congress. And it has to be one or the other. It can't go both ways, can't go opposite ways, and we would say resolve that tension, but when there is congressional findings, something that you obviously didn't have to confront in Stenberg, defer to the congressional approach.

If Stenberg means something contrary, that even in the face of congressional findings that you have to defer to a minority opinion of doctors and, you know, kind of invert what would normally be the way of approaching it, we think then that would be inconsistent with this Court's decision in Casey, among others, and you should revisit Stenberg to that effect, to that extent.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, General.

Miss Smith.

ORAL ARGUMENT OF PRISCILLA SMITH

ON BEHALF OF RESPONDENT

MS. SMITH: Mr. Chief Justice and may it please the Court:

The government throughout this case has quarreled with the plaintiff's statement of Stenberg and Congress quarreled clearly with the district court findings, but their real argument here is with this Court in the Court's ruling in Stenberg, particularly in light of the congressional findings that are, that are frankly unsupported by either the congressional record or the additional evidence presented to the district courts. The only course here that preserves independence of the judiciary, that exemplifies the importance of stare decisis, not to mention the only course that will protect women from needless risks of uterine perforation, infertility, sepsis and hemorrhage, is to hold this act unconstitutional.

JUSTICE KENNEDY: Can you tell me -- I didn't find it in the materials. Maybe the statistics aren't available. In the cases where intact D&E or D&Xs are performed in the period I guess, what, 16 through 20, 21st, 22nd weeks, in how many of those instances, do you have any idea, in how many of those instances is there serious health risk to the mother that requires

the procedure as opposed to simply being an elective procedure? Are there any statistics on that?

MS. SMITH: No. In terms of the underlying medical conditions there really aren't, Your Honor, and it varies dramatically according to the practice of the physician. If a physician is in a high risk OBGYN practice, he or she is much more likely to encounter patients with serious underlying medical conditions such as the ones that the doctors have testified about in this case, the liver disease, kidney disease, heart, cardiovascular disease, cancer of the placenta, bleeding placenta previa, all of these issues and underlying conditions that makes the impact and the risks that are reduced by the intact D&E particularly important.

CHIEF JUSTICE ROBERTS: We have no evidence either in the record before the Court or Congress as to how often that situation arises?

MS. SMITH: No, we don't, Your Honor. We know that in some practices it's quite frequent, in some practices it's not as frequent because those are mostly hospital-based practices. But on the other hand, there's extensive evidence in this case, much more evidence frankly, Your Honor, Justice Breyer, than there was in the Stenberg case, of the, of the --

JUSTICE KENNEDY: A have just other question

that's generally related to the first. If there is substantial evidence that other procedures or alternate procedures are available, alternate to D&X, alternate to intact D&E, is your response that, although they're available as a matter of science, as a matter of, of medical expertise, they are not available because hospitals don't allow the patients to be admitted? I was going to ask that same question to the government, because there is some indication in the record that certain hospitals just don't admit patients for this purpose, which is -- goes back to my earlier question. I was wondering if that's because it's shearly elective.

MS. SMITH: Because it's what sir?

JUSTICE KENNEDY: Because it's purely elective and not medically necessary.

MS. SMITH: No, Your Honor. Hospitals, many, many hospitals throughout the United States refuse to provide any abortions whatsoever as just a blanket rule. There are some that will provide abortions in certain, in certain circumstances where the woman is obtaining the abortion because of a certain medical condition. Then there are women who are obtaining an abortion because they have chosen that that's the best course for them who also have underlying medical conditions. So if you're a woman who has chosen to

obtain an abortion and you have an underlying cardiac disease, for example -- we had a case like this in Louisiana. The hospital refused to do the abortion because her chance of dying from the underlying medical condition was not over 50 percent. So the availability of hospital services is somewhat unrelated to this case, but it is, it is quite limited in some circumstances.

JUSTICE KENNEDY: Well, it might be related in the sense that the government's argument that there are alternate mechanisms is not a practical alternative. I was going to ask the government about that. On the other hand, the fact that any number of hospitals don't allow the procedure is also indicated, indication that there is a medical opinion against it.

MS. SMITH: No, not at all, Your Honor. The medical opinion in those cases is against abortion whatsoever and a refusal to use one's facilities to provide any abortion --

JUSTICE BREYER: So in terms of --

MS. SMITH: -- of any kind, not about any particular procedure.

I'm sorry, Justice Breyer.

JUSTICE BREYER: I didn't like your characterization and the government's of the state of the record. I asked my law clerk basically to go look

up every statement that was made in four forums. The first was the first Stenberg case. Second was Congress. Third is this, one of the cases here; and the fourth is the other case here. Now, my own impression of that is if you're talking about the medical need for such a case, that is for intact D&E, that there is a risk attached if you don't use it in some instances. The fewest number of statements for that proposition was in the first Stenberg.

MS. SMITH: Yes.

JUSTICE BREYER: More statements in Congress, more statements that you -- doctors who say, I need this procedure for safety.

MS. SMITH: There are many more in this --

JUSTICE BREYER: There are many more in this case than there were -- in these two cases there are many more than there were in Congress and in Congress there are many more than they were in first Stenberg.

MS. SMITH: That's right.

JUSTICE BREYER: Now, if we look to the other side of the coin, the doctors who say, no, it isn't safe, there I'd have to say there are probably many more in Congress than there are -- who say it isn't safe, there are probably many more in Congress; and then there are some in these cases, too; and there are hardly

any in Stenberg, not too many.

MS. SMITH: Well, there is --

JUSTICE BREYER: It was against you, in other words.

MS. SMITH: There are many letters written to Congress that are in the record. In terms of live witnesses, Your Honor --

JUSTICE BREYER: Yes.

MS. SMITH: -- there were in Congress eight live witnesses that testified.

JUSTICE BREYER: All right, so I'm left with a record where I guess you have a subjective characterization that there is at least as much evidence in these cases supporting you and as much in Congress supporting you as there was in the first Stenberg case. But Congress made this finding, so what am I to do with the finding?

MS. SMITH: Right. Well, the important point, Your Honor, is that even if the Court applied the highest level of deference under Turner, the findings would be rejected and must be rejected, as all three district courts, held because they're simply unreasonable even under a Turner standard.

JUSTICE GINSBURG: Ms. Smith, was the statement of the American college Obstetricians and

Gynecologists before Congress?

MS. SMITH: Yes, Your Honor, it was, as was the brief that was filed, the amicus brief that was filed in this case in Stenberg was before Congress, and also testimony from numerous physicians in the form of a letter. In terms of live witnesses, there were simply not that many.

CHIEF JUSTICE ROBERTS: We'll give you an extra 30 seconds. Proceed.

MS. SMITH: That's fine, Your Honor. I've lost track of my thought, however, I think.

I think from the statement there were eight witnesses who testified live.

JUSTICE BREYER: My question basically I think you might have been going after is, I was saying that I agreed with you in that there is more evidence supporting your side in these cases than there was before Congress, than there was in first Stenberg.

MS. SMITH: Yes.

JUSTICE BREYER: But still there was a finding in Congress and there wasn't a finding in the Nebraska legislature, and so does that fact of the finding being in Congress and not in the Nebraska legislature -- what kind of legal difference does that make?

MS. SMITH: And Your Honor, what I would say in this case, it makes none. While it's an extremely interesting academic question about the level of deference that should be applied in this kind of circumstance, here it really is academic because under, even under the Turner standard, if applied in a way that Turner actually applied deference, to carefully review the findings in light of the evidence in Congress and again in light of the evidence in the district court --

JUSTICE STEVENS: May I ask you this question about what you think we should do. If I thought the evidence did support the conclusion that it's never medically necessary, it merely -- the evidence merely supports the proposition that a doctor has to be a lot more careful if he goes one way rather than the other because there are more risks involved in one procedure rather than the other, would that be sufficient to support the -- I can see the argument that the intact delivery may have less risk of complications and so forth without it not necessarily being absolutely necessary.

MS. SMITH: Well, I think there is, there's been some confusion about the word "necessary" and it's been used sometimes to talk about whether there are other procedures that could be used, as opposed to the

determination that it is the safest procedure that reduces significantly the risk of very serious complications, not the risks of minor complications.

CHIEF JUSTICE ROBERTS: I guess that gets back to the point earlier. I mean, do you agree with the discussion earlier that this act is not going to prevent abortions?

MS. SMITH: No, not at all, Your Honor. I -- the issue of the scope and breadth of the law is -- I think the evidence clearly shows that this is a very broad law that applies to D&E abortions and, contrary to what the Solicitor General said about the intent of abortions, abortion providers like Dr. Rabacker and others, they actually, their intent is always to remove the fetus as intact as possible, and the district courts have recognized that as an intent that's covered under the terms of the act.

CHIEF JUSTICE ROBERTS: What degree of marginal impact on safety do you think is necessary to override the State's interest? I mean, if you have complications under the D&E procedure in say 10 percent of the cases, complications under D&X in 9.99 percent of the case s, is that marginal benefit in safety enough to override the State's articulated interest?

MS. SMITH: I don't believe a marginal

benefit in safety is enough and I don't believe that's what we have here. The testimony from over, from at least 11 board-certified OBGYNs, from the American College of Obstetricians and Gynecologists, is that the reduction in risk is significant and that it reduces the risk of serious complications, such as uterine perforation, which that lead to hysterectomies and infertility.

CHIEF JUSTICE ROBERTS: But I thought your submission earlier is that we don't have any record evidence about how often the complications arise, so it's hard to get a handle on exactly what the difference is in terms of safety under your submission.

MS. SMITH: We don't have a quantification of the safety. What we what we have is the clinical experience of major leading physicians in the field, who've testified that they've used both procedures. In fact, many of them have testified that they perforated uteruses in non-intact D&Es and they've never perforated a uterus in an intact D&E. And that in fact is borne out by the Chasen study, a very small study with very small numbers, but it shows all the serious complications are in the non-intact group.

JUSTICE GINSBURG: If we could go back to the first question that the Chief asked you, you said

yes, it will prevent abortions because of this uncertain line between the D&X and the D&E. Is there a way that Congress could have written the statute that would have insulated the physician who's performing a D&E?

MS. SMITH: Absolutely, Your Honor. I think that the blueprint that this Court laid out, that certainly is suggested in Justice O'Connor's concurrence in Stenberg, was rejected by Congress. She references three statutes, that if they had included a health exception, she thinks would have been constitutional. They all include the word intact.

I think there's another narrower construction of the Act too that is possible. Adding in the word intact, reading in the word intact, it seems to me, is not a reasonable interpretation of the statute as it is, but certainly Congress could have done that and other states have done it, but Congress set out not to do that.

JUSTICE SOUTER: May I ask you to focus on one particular problem that I think is implicated by Justice Ginsburg's question. If I understood you correctly a moment ago, and I think this is in your briefs too, you said that the definitional problem is that doctors always set out to do an intact procedure if they can, because it involves less risk to the mother

from, from acts performed inside. And if that's the case, then it would be, I guess in the real world, very difficult for Congress to define a difference between D&E and D&X, because the intention is always, as you understand it, to have an intact result.

Your brother on the other side, the Solicitor General says there certainly is testimony to the effect that that is not so. That doctors who intend to perform a D&E simply intend at the beginning to have a lesser degree of dilation which will force them to do the D&E and not have a totally intact procedure.

Would you comment on what I think is the factual difference between you and the Solicitor General there?

MS. SMITH: Yes, Your Honor. The -- the problem with the law is that because it's not limited to intact, it would in fact cover the procedures that are performed by physicians who intend to perform a procedure as intact as possible but simply don't expect that.

JUSTICE SOUTER: I understand that.

MS. SMITH: Yes.

JUSTICE SOUTER: But could you start simply with the factual predicate for your argument and his argument. You seem to be starting from, if I understand

the two of you correctly, you seem to be starting from basically different factual assumptions. Could you, could you start by commenting on that?

MS. SMITH: Yes. The doctors perform the same dilation protocols whether they are going to perform a D&E or an intact D&E, and that's true for Dr. Chasen and Dr. Westhoff, who performed both intact and non-intact procedures.

CHIEF JUSTICE ROBERTS: I thought the evidence was that you're looking for a different degree of dilation if you're intending to perform D&E than if -- and you're looking for a greater degree if you're intending to perform a D&X.

MS. SMITH: It doesn't play out that way. Doctors do have different dilation protocols, but they are often looking for as much dilation as they can get. On the other hand --

CHIEF JUSTICE ROBERTS: Is your submission that there aren't dilation protocols if you're intending a D&E and if you're intending a D&X, they're the same?

MS. SMITH: It varies by doctor. For example, Dr. Carhart uses the same dilation protocol whether he's going to do an intact or a non-intact. Other doctors might try to do more dilation. And the doctors, importantly, can't control the amount of

dilation they get, so a decision happens.

JUSTICE SOUTER: Well, they may not be able to control it in an absolute sense, but can't they go about it in a way that would tend to produce less rather than more dilation?

MS. SMITH: Not --

JUSTICE SOUTER: It can't guarantee results, but couldn't they at least start with a, I don't know how you put it, a procedure that would be likely to produce less rather than more, and hence come within the safe harbor, if you will, of the statute?

MS. SMITH: Well, they are always looking for a minimal amount of dilation. Then people who chose to do another day of dilation, for example, that could add additional dilation. But for the first day of dilation, no, Your Honor. They don't seek more or less over one day. They might do a second day or --

JUSTICE SOUTER: Well, you say they don't, but my question is, can they? And the record may not show this. I'm not asking you to answer the impossible, but do we have evidence that would indicate that they can or that they can't?

MS. SMITH: Not in the first day of dilation, no. They can't control how much dilation is going to occur. They need a minimal amount and they are

not going to shoot for less than that.

JUSTICE SOUTER: Can you tell us where to look in the record for the evidence on that?

MS. SMITH: Each doctor testifies about their own dilation protocols, Your Honor, and I believe that's in the Eighth Circuit appendix. Those -- those -- portions of that testimony, and are cited more specifically in the Eighth Circuit briefs, which goes more into the factual detail, Your Honor, but I don't have the cites right now. I'm sorry.

JUSTICE GINSBURG: If there were a health exception --

MS. SMITH: Yes.

JUSTICE GINSBURG: The health of the woman, would that obviate the vagueness and overbreadth problems that you bring up? Because then after we say to the doctor, you put the health of your patients first and if you think that it's riskier for her health to do it one way than another way, then you pick this way. If you had that, then wouldn't the concerns about overbreadth fade?

MS. SMITH: Not if this is not limited to intact, Your Honor, because then you would be limiting D&E abortions, which is 95 percent of all abortions, to circumstances where the doctor could prove that it was

in fact the safest procedure. And we've had doctors testify in trial, for example, that they refused to describe even intact or regular D&Es to their patients because they believe induction is always safer. So those doctors, I think would still be at risk, and it would put 95 percent of second trimester abortions at risk in that case, to prosecution for performing a D&E when you should have been performing an induction procedure.

CHIEF JUSTICE ROBERTS: Do you think the, on the same issue I think, that the addition of the deliberately and intentionally language in the congressional act addresses that concern?

MS. SMITH: No, Your Honor, because actually that same language is in the Stenberg, the Nebraska statute. It also was targeted at deliberately intentionally. I do think that if there is a construction that would narrow the law to a limited amount of intact D&Es, if you read the "for the purpose of" language in the statute, to be performing an overt act for the sole purpose of completing delivery, then -- or rather -- I'm sorry. For the purpose of performing an overt act that causes fetal demise, that does not facilitate delivery of the statute -- of the fetus.

JUSTICE KENNEDY: That's what I was

wondering, because --

MS. SMITH: I'm sorry.

JUSTICE KENNEDY: Suppose, this might help, suppose the physician testifies that I wanted to do a non-intact, an in utero D&E, that that's, that was my intent, that's what I wanted to do, that's what I always want to do. In this case I had an intact delivery and had no other choice. Are you saying that we could interpret the statute to say that that is not the prohibited criminal intent, he is immune from prosecution in that case?

MS. SMITH: No. I don't believe that's the line that could be drawn, Your Honor, because anyone who does a D&E is intending to remove the fetus as intact as possible, and always can have the intent to go to the anatomical landmark that's here. I'm suggesting a different interpretation that uses the "for the purpose of" language where it says for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus. If that language was interpreted to be for the sole purpose of performing fetal demise at that point, rather than what the doctors do, which is perform the action that causes fetal demise in order to facilitate delivery of the fetus. So if it's not to facilitate delivery of the fetus --

JUSTICE KENNEDY: Well, give me one instance in which your proposed interpretation would work in the real world.

MS. SMITH: Well, there are allegations in the Congressional Record, for example, in reference -- in Justice Thomas' dissent by Schaffer, Dr. Pamela Smith, about circumstances where the physician actually holds the fetus in the woman's body in order to cause fetal demise, rather than causing fetal demise because it's an integral part of removal of the fetus from the woman's uterus. And those circumstances would be banned under that interpretation.

But I want to get back to the Turner point, if I may for a minute, the issue of deference to congressional finding.

JUSTICE KENNEDY: Well, just on that last point, I mean, we are interested of course in different interpretations, but it just seems to me that your interpretation would have very little practical effect.

MS. SMITH: Well, it would -- it would ban certainly a certain type of intact procedure that was discussed, and I think the image many people have of "partial-birth abortion" frankly, that this is something that's done gratuitously, not as an integral part of making this procedure the safest for the woman, and

avoiding instrumentation and avoiding perforation and hysterectomies, which are serious complications that though rare, when they occur, they are catastrophic and life changing and disastrous. So the numbers are not high of any complications, but the complications when they occur are, are devastating. And this is what the doctors are experiencing when they perform intact D&Es, that they are not having these types of complications.

So -- if I can move to the deference point, I would like to talk a little bit about deference to congressional findings because there is significant authority from this Court of course, saying that where there are danger signs of constitutional risks, as the Court recently said in Randall versus Sorrell, that the Court must independently and carefully review congressional findings. And the Court has rejected findings that attempted to change either by findings of fact or legal findings, that attempted to change a constitutional standard.

But in any case, the findings in this case are simply unreasonable and not supported by the evidence. If you go to the findings themselves, the ultimate finding in 14o, which claims that it is actually relying on the preceding findings, it says, "for these reasons, Congress finds that partial birth

abortion is never medically indicated," and then you go backwards and look at the reasons. The reasons are the findings that are not defended by the government, that were not defended by the government witnesses and that are blatantly false, except for perhaps one of them.

There are findings of, that partial-birth abortion poses serious risks. The government witnesses agreed that this was not true.

Their findings that partial-birth abortion is not taught in medical schools. Of course, we know that is simply not true, it's an integral part of abortion training at major medical institutions like Cornell, Columbia, Yale, NYU, Northwestern, etc.

It says that abortion, partial-birth abortion is a disfavored practice along abortion providers. That is absolutely not true.

And it says that there are no comparative studies. We know now that is not true because the Chasen study has come out, and is the first study of its kind to try to evaluate the differences between intact and non-intact. It is still true that there are no controlled studies, there is no randomized clinical trial, but if that were the standard, no new and safer abortion procedures could ever be developed.

Turn back, Your Honors, to the health issue.

CHIEF JUSTICE ROBERTS: Could I ask you just one thing?

MS. SMITH: Yes.

CHIEF JUSTICE ROBERTS: The statute, of course, refers to both feet first and vertex deliveries. How common is the vertex delivery in the D&X?

MS. SMITH: Not very common. Not very common, Your Honor. It would occur in circumstances where there is a significant fetal anomaly and some kind of a, something called a sides, or another type of fetal anomaly where there is a distension of the abdomen, but it's very rare.

CHIEF JUSTICE ROBERTS: And in giving your arguments toward the safety benefits of the D&X, I couldn't understand why they wouldn't also apply to the total delivery of the fetus in a vertex delivery situation.

MS. SMITH: I'm sorry. I don't know if I understand.

CHIEF JUSTICE ROBERTS: Well, my understanding is that the vertex, the skull and head are already outside the mother.

MS. SMITH: Yes.

CHIEF JUSTICE ROBERTS: And the objection in the feet first is that you want fewer instrument

passes and so on.

MS. SMITH: Yes.

CHIEF JUSTICE ROBERTS: But in that case, it's not the skull itself that is preventing the delivery of the fetus.

MS. SMITH: Right.

CHIEF JUSTICE ROBERTS: So your arguments about why the D&X is safer than feet first, wouldn't that apply in the case of total delivery of the fetus as well? In other words, if you want as much of the fetus intact and out as possible, why wait, stop it halfway? Wouldn't the safety argument suggest delivery of the fetus?

MS. SMITH: Yes, but these are circumstances where the fetus can't be delivered. That's the point, Your Honor, is that the fetus is obstructed and so the overt act that takes place is --

CHIEF JUSTICE ROBERTS: In the case of a vertex delivery, where is the obstruction?

MS. SMITH: The obstruction would come from a distension of the abdomen, usually from a fetal anomaly like a sides, which is, this is a serious anomaly. It's lethal anomalies that I was talking about. And in those circumstances, an overt act would need to be performed that would in fact cause fetal

demise before the fetus could be, the delivery could be continued.

JUSTICE KENNEDY: It seems to me that your argument is that there is always a constitutional right to use what the physician thinks is the safest procedure.

MS. SMITH: No, Your Honor. I think the --

JUSTICE KENNEDY: I inferred that from your comments.

MS. SMITH: I don't think so, Your Honor. What, what the Court held in Stenberg in applying the appropriate medical judgment standard of Casey, was that there had to be a substantial body of medical opinion, an objective standard that in fact supports the use of that procedure. And that both, that balances concerns against protecting a woman's health with a concern of unfettered discretion, which the Court has rejected.

JUSTICE KENNEDY: So then, you think there are instances in which the state can require that a procedure be used, even if it's not the safest procedure?

MS. SMITH: I'm sorry. I --

JUSTICE KENNEDY: So then, the --

MS. SMITH: Yeah.

JUSTICE KENNEDY: The obverse of the

proposition I put at first, it must be true that there are some instances in which the state can prohibit a procedure even if it is the safest procedure.

MS. SMITH: That's true, Your Honor, as long as it doesn't pose an undue burden on the woman, which as you know, certainly the circumstance with the D&E, which is 95 percent of abortions, under the Stenberg ruling.

CHIEF JUSTICE ROBERTS: Can I just follow up on that?

MS. SMITH: Yes.

CHIEF JUSTICE ROBERTS: I don't understand that. In other words, the fact that it's not the safest procedure does not itself constitute an undue burden? In other words, under Justice Kennedy's hypothetical --

MS. SMITH: I don't understand what you mean.

CHIEF JUSTICE ROBERTS: He said that the state can prohibit something even if it is the safest procedure, and your answer was so long as it doesn't --

MS. SMITH: No.

CHIEF JUSTICE ROBERTS: -- pose an undue burden. And I was just following up to say that so, in some circumstances, prohibiting what you think is the safest procedure does not itself constitute an undue

burden.

MS. SMITH: No. I understood Justice Kennedy's question to be, could the state prohibit what it thinks is not the safest. And under the Stenberg ruling, although the Court hasn't addressed that question directly, under Stenberg what the Court has said is, the Court can ban procedures only where there is not significant medical authority supporting their use as the safest procedure in some circumstances. So perhaps I misunderstood your question.

But the Court has not ever addressed the question, can we ban a procedure that's not the safest. I think the ruling in Stenberg would say well, there has to be significant medical authority that in some circumstances it is the safest. The alternative argument would be, but, if it is the procedure that's used in 95 percent of the cases, or a vast majority of the cases, and banning it would thereby deny women the right to get an abortion and be a substantial obstacle in their path in obtaining a legal abortion, that would be the reason why you can't ban it.

CHIEF JUSTICE ROBERTS: Thank you, Miss Smith.

MS. SMITH: Thank you.

CHIEF JUSTICE ROBERTS: General Clement, you

have two minutes remaining.

REBUTTAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF PETITIONER

GENERAL CLEMENT: Thank you, Mr. Justice. I would like to start with a few points in rebuttal.

I'd like to start with Justice Kennedy's comment, and the answer to that is there will always be an alternative available as a practical matter. The alternative will always be the D&E procedure, which the district court in this case called the gold standard. And the best evidence of that, Justice Kennedy, is that their own witnesses like Dr. Chasen, for example, when they set out to perform the D&X procedure, they are only successful about 33 percent of the time. What happens in the other 67 percent of the cases is they actually, even though they tried to perform a D&X, will perform a D&E. And so all of the clinics that provide D&X also necessarily provide D&E, because the D&E is what they end up with if they are not able to remove the fetus intact. So in every single case, there are some, you know, the induction procedure has to be done in a hospital, but the D&X and D&E procedures are both equally available in clinics, so no woman as either a theoretical matter or a practical matter, is going to be denied a safe alternative to end her pregnancy.

I wanted to pick up on Justice Souter's question as well. You asked for factual citations in the record on this dispute between us. I think the record is really overwhelmingly in our favor. I point you to Dr. Fitzhugh, who's one of the plaintiffs on this side. 1305a, he says he doesn't try for intact delivery in every case because it would necessitate a second round of dilation, a second round of laminarias, so he doesn't do the second round, he gets dismemberment. Dr. Knorr, another one of the plaintiffs, at page 142a, he says the procedure would require greater dilation.

And if I could just finish on the citations, Dr. Vibhakar, who does dismemberment 100 percent of the time, 148a -- all of these are in the petition appendix of the district court opinion -- Dr. Cranen explains his procedure at 174a to 177a. Thank you

CHIEF JUSTICE ROBERTS: Thank you, General. The case is submitted.

(Whereupon, at 11:07 a.m., the case in the above-entitled matter was submitted.)

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